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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-223

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

EDDIE JACKSON & RONALD GARRETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction to review the judgment of the Supreme Court of Pennsylvania because that judgment was based upon an independent and adequate state ground.

2. Whether evidence that respondents engaged in illegal narcotics activity in

the State of Michigan in January, 1972 was too remote to establish probable cause to believe their automobile contained narcotics when stopped for a speeding violation in Pennsylvania in June, 1972, where there was no actual evidence that respondents were committing any crime at the time they were stopped.

3. Whether the exclusionary rule should be abandoned so as to permit the use of unlawfully seized evidence, where no effective alternative means of controlling unlawful police conduct is operative.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania Constitution, Article 1, Section 8

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA.

Article 1, Section 8, of the Pennsylvania Constitution reads as follows:

> "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

In the decision below, the Supreme Court of Pennsylvania held that the search

warrant was " . . . constitutionally defective, in that it was issued without a showing or probable cause . . . ," and that evidentiary use of the property seized was thus "constitutionally proscribed . . . ." (Petition, App. A, pp. 27-28).

While the opinion makes no specific reference to either the United States Constitution or the Pennsylvania Constitution, it is clear that the decision was based upon both federal and state law. Not only are both federal and state authorities cited throughout the opinion, but regarding the key "staleness" issue, the Pennsylvania Supreme Court relied most directly upon its own decisions in Commonealth v. Eazer, 455 Pa. 320, 312 A.2d 398 (1973); Commonwealth v. Simmons, 450 Pa. 624, 301 A.2d 819 (1973); and Commonwealth v. Shaw, 444 Pa. 110, 291 A.2d 897 (1971).

Moreover, in Commonwealth v. Eazer, supra, where the Pennsylvania Supreme Court espoused the language "actual continuity" [of the illegal enterprise] which petitioner finds objectionable, the court expressly noted that its decision was mandated by the Pennsylvania Constitution as well as the Fourth Amendment of the United States Constitution. 312 A.2d 398, 399 n.2.

It is well settled that this Court will decline to review cases based upon independent and adequate state grounds. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965). Accordingly, the instant petition should be denied for lack of jurisdiction.

II

PETITIONER HAS MISCONSTRUED THE STALENESS STANDARD APPLIED BY THE SUPREME COURT OF PENNSYLVANIA. THE PENNSYLVANIA COURT CORRECTLY HELD THAT PROBABLE CAUSE TO SEARCH THE TRUNK OF RESPONDENTS' AUTOMOBILE DID NOT EXIST.

Petitioner states:

> "The standard which the Pennsylvania court applied was that 'evidence to demonstrate continued criminal activity must establish actual continuity of the illegal enterprise.' (emphasis theirs). 'Actual' was applied to mean proof beyond doubt, effectively requiring that the officer prove the crime before he may legally search, and proof beyond doubt is not within the concept of probable cause under the Fourth Amendment."

(Petition, p.14)(emphasis in original).

The Pennsylvania Supreme Court did not apply, or even suggest, any such requirement of "proof beyond doubt." The following is the relevant portion of the decision below:

> "The Commonwealth argues the furtive behavior of the appellants, when considered with the reports of past criminal narcotic activity, dictated the probability that, on June 14th, the appellants were using the Pennsylvania Turnpike for the transportation of narcotics, thus supplying the required element of continuity. However, evidence to demonstrate continued criminal activity must establish actual continuity

of the illegal enterprise. Commonwealth v. Eazer, supra at 324, 312 A.2d at 400. Herein, Trooper Wynn possessed no information that a crime had been committed. He had neither an informant's tip nor the benefit of police surveillance to indicate that narcotics were being transported in the Ford vehicle. Although the appellants' behavior may not have been of an outwardly innocent character, it was not such as indicated a probability that narcotics would be found in the Ford automobile. The appellants' responses and movements may have appeared suspicious to Trooper Wynn, but 'mere suspicion' is not an adequate ground for the issuance of a search warrant. Nathanson v. United States, 290 U.S. 41, 47, 54 S. Ct. 11(1933); United States v. Day, 455 F.2d 454,456(3d Cir. 1972); Commonwealth v. Pinno, 433 Pa. 1,5, 248 A.2d 26 (1968). Therefore, we conclude there did not exist probable cause to search the trunk of the Ford automobile for narcotics and controlled substances."

(Petition, App. A, p.29)(emphasis in original).

In Commonwealth v. Eazer, cited in the above paragraph, the Pennsylvania Supreme Court reversed the appellant's conviction of conducting a lottery, and held that a sixty-one day hiatus between alleged commission of a criminal act and application for the search warrant vitiated any showing of probable cause as of the date the warrant issued. There the court wrote:

> "[S]urveillance of appellant's home failed to establish continuing criminal activity. Evidence, to demonstrate continuing conduct, must establish actual continuity of the illegal enterprise. A police officer's unsubstantiated impression that a particular crime is of the sort which usually is continuing is not sufficient; nor may a magistrate issue a warrant upon such an impression."

312 A.2d 398, 400 (footnote and citations omitted).

Thus, in both Eazer and the instant case, by the phrase "actual continuity of the illegal enterprise," the Pennsylvania Supreme Court sought to distinguish a situation where police have actual evidence of continued criminal conduct, from one in which they merely infer or suspect there to be continuity without objective evidence thereof.1/ The Pennsylvania court certainly did not hold, as petitioner suggests, that such evidence must establish existence of the criminal conduct by "proof beyond doubt" in order to support issuance of a search warrant.

Here, the prior conduct consisted of the following information set forth in the affidavit of Trooper George Wynn: (1) that on January 21, 1972, Jackson had been stopped for speeding while traveling east on the Pennsylvania Turnpike and a brown paper bag containing twenty-five thousand dollars in cash was found in his possession; (2) that as of January 21, 1972, the Detroit Police Department was in receipt of information from a "reliable confidential in-

1/ See Sgro v. United States, 287 U.S.206, 211 (1932).

formant" that Jackson was a large scale narcotics dealer in the Detroit area; and (3) that shortly after January 21, 1972, Jackson and Garrett were arrested by federal authorities on narcotics charges.

The information concerning prior narcotics activity of respondents was thus uncorroborated hearsay concerning alleged conduct in Detroit, Michigan in January of 1972. Trooper Wynn possessed no objective evidence that this activity continued after the alleged federal narcotics arrest of respondents "shortly after" January 21, 1972, much less that respondents were actually in possession of narcotics when stopped for speeding some five months later in Cumberland County, Pennsylvania.

Under standards well established by this Court, the Supreme Court of Pennsylvania correctly held that probable cause to search the trunk of respondents' automobile did not exist. Spinelli v. United States, 393 U.S. 410 (1969); Aquilar v. Texas, 378 U.S. 108 (1964); Nathanson v. United States, 290 U.S. 41 (1933); Sgro v. United States, 287 U.S. 206 (1932).

III

THERE IS NO NEED FOR SUPREME COURT REVIEW OF THE EFFECT OF STALENESS UPON THE DETERMINATION OF PROBABLE CAUSE TO CONDUCT A SEARCH. THE RECORD IN THIS CASE IS PARTICULARLY UNSUITABLE FOR SUCH REVIEW EVEN IF IT WERE NECESSARY.

The staleness of information presented to the issuing magistrate is but one factor to be considered in the determination of probable cause to conduct a

search. It is not susceptible to precise guidelines, but must be determined on a case-by-case basis. As the Court observed in Sgro v. United States, 287 U.S. 206, 210-211 (1932):

> "[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case."

Neither the federal courts of appeals nor the state courts have been troubled with this concept,[2] and there appears no sufficient reason to reexamine it at this time.

Moreover, the record in this case is particularly unsuitable for such review even if it were necessary.

The staleness issue is typically raised in a case where police officers have probable cause to conduct a search at one point in time, but they delay and fail to act upon it until some later date.[3] The question then presented is whether or not the passage of time vitiated the once

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2/ See, e.g., United States v. Harris, 483 F.2d 1115 (3d Cir.1973); Durham v. United States, 403 F.2d 190 (9th Cir. 1968); Schoenman v. United States, 317 F.2d 173 (D.C. Cir. 1963); and numerous cases collected in 100 A.L.R.2d 525 (1965).

3/ See, e.g., Sgro v. United States, supra; Durham v. United States, supra; Commonwealth v. Shaw, supra.

existing probable cause.

As indicated above (pp.7-8, supra), the prior information in this case consisted of uncorroborated hearsay to the effect that in January, 1972, Jackson was reportedly a large narcotics dealer in Detroit; that on January 21, 1972 Jackson had been stopped for speeding on the Pennsylvania Turnpike and $25,000 in cash was found in his possession; and that shortly after January 21, 1972, both respondents were allegedly arrested by federal authorities on narcotics charges.

Certainly it is doubtful that this information would have established probable cause to search the trunk of respondents automobile for narcotics even if it had been fresh. Understandably then, the decision below was not based soley on staleness, but on an overall lack of probable cause at the time the warrant issued. Thus the staleness issue is not even squarely presented in this case.[4/]

There is another aspect of this case which sets it apart from the usual staleness situation. Here the Pennsylvania State Troopers were not investigating respondents Jackson and Garrett for narcotics violations, and they did not obtain information concerning criminal activity of respondents and then deliberately delay seeking a search warrant. Rather, the Troopers merely stopped respondents vehicle for speeding during routine patrol of the Pennsylvania Turnpike. All of the information concerning respondents alleged narcotics activity was thereafter obtained through communications with the Detroit Police Department. Therefore, this record does not present an opportunity to examine the various factors which may justify delay in seeking a search warrant in the far more typical situation of an ongoing police investigation. See, e.g., United States v. Harris, 482 F.2d 1115 (3d Cir. 1973).

Finally, it should be emphasized that in the courts below respondents also challenged the validity of the initial warrantless search of their automobile during which the state troopers discovered the absence of a trunk key and a Blue Cross identification card belonging to neither respondent. This information was set forth in the issuing affidavit (Petition, pp. 9-10), and relied upon by the Commonwealth in its contention that probable cause existed to conduct the further search of the vehicle's trunk. (See Petition, pp.15, 19).

If this information were indeed the product of an unlawful search, then the subsequent search of the trunk would be

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4/ Compare Commonwealth v. Eazer, 455 Pa. 320,312 A.2d 398 (1973), where the Pennsylvania Supreme Court did base its decision soley on the question of staleness, and therefore considered it unnecessary to determine whether the information presented to the magistrate was sufficient to establish probable cause. See 312 A.2d at 399 n.3.

invalid aside from the staleness question.[5/] This is an additional reason why this record is a poor choice for Supreme Court review of the staleness concept.

IV

SINCE NO EFFECTIVE ALTERNATIVE TO THE EXCLUSIONARY RULE IS PRESENTLY OPERATIVE, REVERSAL OF THE DECISION BELOW WOULD LEAVE UNLAWFUL POLICE CONDUCT UNCHECKED.

Petitioner describes as "brilliant" and "innovative" police conduct which the Supreme Court of Pennsylvania held to be unlawful, and urges this Court to abandon or modify the exclusionary rule so as to render evidence seized as a result of that conduct admissible at trial.

While the exclusionary rule may eventually be replaced by a more effective control over unlawful police conduct, that day has not yet arrived. Since no effective alternative to the exclusionary rule is presently operative, reversal of the decision below would leave unchecked, and only encourage, further unlawful police invasion of constitutional guarantees.

5/ Because the Pennsylvania Supreme Court found that probable cause did not exist even if this information were considered, it did not reach the issue of the legality of the initial warrantless search. (Petition, App. A, p.26 n.3).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

October, 1975